United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2108. 697

HEINE SAFETY BOILER COMPANY, A CORPORATION, AND THE EMPIRE STATE SURETY COMPANY, A CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF THE AMERICAN ENAMELED BRICK AND TILE COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 19, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2108.

HEINE SAFETY BOILER COMPANY & THE EMPIRE STATE SURETY COMPANY, CORPORATIONS, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF THE AMERICAN ENAMELED BRICK & TILE COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1910.

In the Court of Appeals of the District of Columbia.

No. 2108.

HEINE SAFETY BOILER Co. et al., Appellants,

vs.

THE UNITED STATES OF AMERICA to the Use of the AMERICAN ENAMELED BRICK & TILE Co.

---

a Supreme Court of the District of Columbia.

No. 51704. Law Doc.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation, Plaintiff,

vs.

HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed June 10, 1909.

In the Supreme Court of the District of Columbia.

No. 51704. Law Doc.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation, Plaintiff,

vs.

HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Defendants.

The plaintiff, the United States of America to the use of the American Enameled Brick and Tile Company, a corporation duly

incorporated under the laws of the State of New York, sues the defendants the Heine Safety Boiler Company, a corporation duly incorporated under the laws of the State of Missouri, and The Empire State Surety Company, a corporation duly incorporated under the laws of the State of New York, for that heretofore, to wit, on the 20th day of June, 1907, the said defendant Heine Safety Boiler Company entered into a written contract with the United States of America, represented in that behalf by one J. B. Reynolds, Acting Secretary of the Treasury, to furnish all of the labor and materials, and to do and perform all the work required for two new, high pressure steam boilers, etc., in the boiler room in the south court of the Treasury Building at Washington, D. C., in strict and full accordance with
2 the requirements of certain drawings furnished or to be furnished to said defendant by the Supervising Architect of the United States Treasury Department, and to secure the faithful observance and performance of all and singular the covenants and conditions of said contract and the performance of all the undertakings therein stipulated by said defendant to be performed by it, and to well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in or additions to or omissions from said contract which might thereafter be made, and all the undertakings stipulated by said defendant to be performed in any and all such changes in or additions thereto, and that it should promptly make payment to all persons supplying said defendant with labor or materials in the prosecution of the work contemplated by said contract, and in compliance with the statute in such case made and provided, the said defendant Heine Safety Boiler Company as principal, and the defendant The Empire State Surety Company as surety, did, on, to wit, the 25th day of June, A. D. 1907, make, execute and deliver to the United States of America, their certain bond or writing obligatory (now shown to the Court here), wherein they held and firmly bound themselves unto the said United States of America in the penal sum of Five Thousand (5,000) Dollars, the condition of said bond or writing obligatory being that said defendant Heine Safety Boiler Company should and would well and truly fulfill all the covenants and conditions of the aforesaid contract, and should perform all the undertakings therein stipulated by it to be performed, and
3 should well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in or additions to or omissions from said contract, which might thereafter be made, and should perform all the undertakings stipulated by it to be performed in any and all such changes in or additions thereto, and promptly make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the aforesaid contract. And, in order to carry out and perform the aforesaid contract, the aforesaid defendant the Heine Safety Boiler Company, on or about the — day of ——, A. D. 1907, entered into a contract with, or employed, one H. L. Dorsey, the plaintiff is not informed which, whereby or whereunder said Dorsey was to supply certain of the labor

and materials requisite and necessary in order that said defendant Heine Safety Boiler Company might carry out its aforesaid contract with the United States of America, said materials including certain brick. And said H. L. Dorsey, in order to carry out his contract, or duties of his said employment, with said defendant Heine Safety Boiler Company, purchased certain of said brick from the use plaintiff as follows: On, to wit, October 11, 1907, 9000 brick called "White Stretchers," and 600 brick called "White Bullnoses," for the price, for said "White Stretchers," of $585.00, and for said "White Bullnoses," of $46.20; and, on, to wit, November 19, 1907, said Dorsey bought of said use plaintiff for the purpose aforesaid, 1000 more brick called "White Stretchers," at the price of $65.00, and 300 more of said brick known as and called "White Bullnoses," at the
4 price of $23.10, and on, to wit, the 7th day of December, 1907, the said Dorsey purchased from the use plaintiff for the purpose aforesaid, 1800 more of said brick known as and called "White Stretchers," at the price of $117.00, and for the necessary packing of said material purchased on November 19th and December 7th, 1907, for shipment to him at Washington, D. C., from the factory of the use plaintiff, the reasonable cost thereof amounted to $21.50, the total price for said brick, including the packing thereof as above set forth, amounting to $857.80. And said use plaintiff furnished to said Dorsey all of said brick as above set forth, and it was used in the performance of the aforesaid contract between the said defendant Heine Safety Boiler Company and the United States of America, and went into the work and construction required for the said two new, high-pressure steam boilers, etc., in the boiler room in the south court of the Treasury Building at Washington, D. C.

The plaintiff further alleges that the aforesaid contract between the defendant Heine Safety Boiler Company and the United States of America, has been completely performed and final settlement thereof authorized by the proper officials of the Government of the United States of America, on, to wit, November 16, 1908, and since said date no suit has been brought by the United States of America in the District of Columbia on said contract or the aforesaid bond. The plaintiff further alleges that no part of the sum due to the use plaintiff by the aforesaid Dorsey for the aforesaid brick has been paid by him or by any one on his behalf, tho' the same is
5 long since past due and payable, and there remains therefore due and unpaid to the use plaintiff, the sum of $857.80, with interest as hereinafter stated, as appears by the Plaintiff's Particulars of Demand attached hereto and made a part hereof.

The Plaintiff further alleges that the use plaintiff is entitled to recover the said sum of $857.80, with interest on the sum of $631.20 from November 11, 1907, until paid, and on the sum of $97.10 from December 19, 1907, until paid, and on the sum of $129.50 from January 7, 1908, until paid, according to the Particulars of Demand hereto annexed and made a part hereof, from the defendants under and by virtue of the terms, conditions and covenants of the aforesaid bond executed and delivered to the United States of America and the statute in such case made and provided, and therefore it

brings this suit and claims from the defendants for the use plaintiff the said sum of $857.80 with interest as hereinbefore specified, and the costs of this suit.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

Notice to Plead.

The defendants are to plead hereto on or before the 20th day, exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise, judgment.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

6 *Particulars of Demand.*

American Enameled Brick & Tile Co., 1 Madison Avenue, New York, N. Y.

Sold to H. L. Dorsey, 1003 E Street, Wash., D. C.

Shipped October 11/07 from Factory via P. R. R., F. O. B. Washington.

Invoice No. 1216.

Your Order Consigned Car No. P. R. R. #20052. Terms 30 Days.

Shipping St'm't No. 499.

" Req. at U. S. Treasury & Boiler R. Freight Collect.

Payable Only in New York Funds.

Our Order No. 4199.

Salesman, Corning.

A-S 1st	Color.	Shape.	Price per M.	Extensions.	
9000	White.....	Stret.....	$65.00	585.00	
600	"	Bnose.....	77.00	46.20	
					$631.20

Certified as correct.
J. FRANCIS BOORAEM,
AMERICAN ENAMELED BRICK & TILE CO.,
Sec'y & Treas.

Contract Subject to the Following Conditions.

No liability is assumed for delay due to strikes, railroad delays, or causes beyond our control. No liability is assumed for loss or damage to goods after delivery to the building. Any shortage, damage or other reasons for claim of improper delivery must be reported

to the New York office within forty-eight hours after delivery, in which case we will gladly give it attention. Receipts signed at the building and the railroad shipping weight will be considered as conclusive proof of quantities.

7 Please examine slip enclosed in every barrel shipped in less than car load lots. Return the same to us with claim if incorrect.

Return Railroad Freight Receipts promptly, so that we can give your account proper credit.

No credit can be given or recovered for excess charges of R. R. Co., unless this is done immediately, and we will not hold ourselves liable for any charges in excess of special rates quoted us.

American Enameled Brick & Tile Co., 1 Madison Avenue, New York, N. Y.

Sold to H. L. Dorsey, 1003 *East* St. N. W., Washington, D. C.

Shipped Nov'r 19/07 from Factory via P. R. R., F. O. B. Factory.

Invoice No. 1248.

Your Order Consigned Car No. —. Terms 30 Days.

Shipping St'm't No. 590.

" Req. at Boiler Room & Treasury. Freight Collect.

Payable Only in New York Funds.

Our Order No. 4257.

Salesman, Corning.

*** A–S 1st ***	Color.	Shape.	Price per M.	Extensions.	
1000	White.....	Stret.....	$65.00	65.00	
300	"	Bnose.....	77.00	23.10	
				88.10	
	Packing.....	.....	.....	9.00	
					$97.10

Certified correct.

J. FRANCIS BOORAEM,
AMERICAN ENAMELED BRICK & TILE CO.,
Sec'y & Treas.

Contract Subject to the Following Conditions.

No liability is assumed for delay due to strikes, railroad delays, or causes beyond our control. No liability is assumed for loss or damage to goods after delivery to the building. Any shortage, damage or other reasons for claim of improper delivery must be reported to the New York office within forty-eight hours after delivery,

8 in which case we will gladly give it attention. Receipts signed at the building and the railroad shipping weight will

be considered as conclusive proof of quantities.

Please examine slip enclosed in every barrel shipped in less than car load lots. Return the same to us with claim if incorrect.

Return Railroad Freight Receipts promptly, so that we can give your account proper credit.

No credit can be given or recovered for excess charges of R. R. Co., unless this is done immediately, and we will not hold ourselves liable for any charges in excess of special rates quoted us.

American Enameled Brick & Tile Co., 1 Madison Avenue, New York, N. Y.

Sold to H. L. Dorsey, 224 4th St. N. W., Wash., D. C.

Shipped Dec. 7/07 from Factory via C. R. R. P. & R. & B. & O. R. R., F. O. B. Factory.

Invoice No. 1257.

Your Order Consigned Car No. C. R. R. #33192. Terms 30 Days.

Shipping St'm't No. 620.

" Your Req. at Boiler Room & Treasury. Freight Collect.

Payable Only in New York Funds.

Our Order No. 4280.

Salesman, Corning.

A–S 1st	Color.	Shape.	Price per M.	Extensions.	
1800	White.....	Stret.....	$65.00	117.00	
	Packing.....	.....	.....	12.50	
					$129.50

Certified correct.

J. FRANCIS BOORAEM,
AMERICAN ENAMELED BRICK & TILE CO.,
Sec'y & Treas.

Contract Subject to the Following Conditions.

No liability is assumed for delay due to strikes, railroad delays, or causes beyond our control. No liability is assumed for loss or
9 damage to goods after delivery to the building. Any shortage, damage or other reasons for claim of improper delivery must be reported to the New York office within forty-eight hours after delivery, in which case we will gladly give it attention. Receipts signed at the building and the railroad shipping weight will be considered as conclusive proof of quantities.

Please examine slip enclosed in every barrel shipped in less than car load lots. Return the same to us with claim if incorrect.

Return Railroad Freight Receipts promptly, so that we can give your account proper credit.

No credit can be given or recovered for excess charges of R. R. Co., unless this is done immediately, and we will not hold ourselves liable for any charges in excess of special rates quoted us.

Affidavit.

COUNTY OF NEW YORK,
State of New York, ss:

John Francis Booraem, being first duly sworn, on oath deposes and says that he is the Treasurer and Manager of the American Enameled Brick & Tile Company, the use plaintiff in the foregoing declaration, to which this affidavit is annexed, and in which the Heine Safety Boiler Company and The Empire State Surety Company are named as defendants; that he has personal knowledge of the matters and things set out in said declaration and in this affidavit and is authorized to make this affidavit. That the allegations of said declaration and the particulars of demand attached thereto, both of which are to be taken and read as part of this affidavit, are true. Affiant further swears that the use plaintiff's cause of action against the defendants is based upon the brick material sold and furnished by it to one H. L. Dorsey as set forth in said declaration, and at the times stated therein and in the particulars of demand attached thereto, for which material the use plaintiff has been paid no part of the price therefor. Said material was used and went into the work and construction required for the two new high-pressure steam boilers in the boiler room in the south court of the Treasury Building at Washington, D. C., which work and construction was undertaken by the defendant the Heine Safety Boiler Company under and by virtue of the contract between it and the United States of America, more fully referred to in the aforesaid declaration, and to secure the faithful performance of the terms and conditions of which, the said defendant Heine Safety Boiler Company executed as principal, and the defendant, The Empire State Surety Company executed as surety, the bond in favor of the said United States of America referred to and described in said declaration, conditioned, among other things, that the said Heine Safety Boiler Company would promptly make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the aforesaid contract; and the use plaintiff having furnished the brick material used by the defendant Heine Safety Boiler Company, through the said H. L. Dorsey, and having received no part of the purchase price therefor or of the cost of packing a portion of said brick for shipment as described in said declaration, is entitled to recover same from the defendants, in pursuance and by virtue of the said bond and the statute in such case made and provided, and the use plaintiff therefore claims from the defendants, exclusive of all set-offs and just grounds of defense, the sum of eight hundred and
10 fifty-seven dollars and eighty cents ($857.80) with interest on the sum of six hundred and thirty-one dollars and twenty cents ($631.20) from November 11, 1907, until paid, and on the sum of ninety-seven dollars and ten cents ($97.10) from December

19, 1907, until paid, and on the sum of one hundred and twenty-nine dollars and fifty cents ($129.50) from January 7, 1908, until paid, and the costs of this suit.

Further affiant saith not.

JOHN FRANCIS BOORAEM.

Subscribed and sworn to before me a Notary Public in and for the County and State of New York, this 7th day of June, A. D. 1909.

ANNIE B. WALTERS,
Notary Public.

[SEAL.]

Notary Public, Kings Co., No. 124.
Cert. filed in N. Y. Co.

Pleas of Heine Safety Boiler Company.

Filed October 27, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51704.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation, Plaintiff,
vs.
HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Defendants.

12 For pleas to the plaintiff's declaration, the defendant, the Heine Safety Boiler Company, a corporation, says:

First. That the defendant, The Heine Safety Boiler Company, the contractor in the plaintiff's declaration mentioned, did make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the contract therein mentioned, and did otherwise and in all other respects fully perform the conditions of its contract and bond, described in said declaration.

Second. That the brick mentioned in the plaintiff's declaration were sold and delivered by the use plaintiff upon three different dates, to wit, brick of the value of $631.20, on October 11, 1907; $97.10 on November 19, 1907; and $129.50, on December 7, 1907; that by the terms of the sale and by the agreement between the use plaintiff and the said H. L. Dorsey, the value of the brick delivered on October 11, 1907, to wit, the sum of $631.20, became due and payable, to wit, on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10 became due and payable December 19, 1907, and the value of the brick delivered on December 7, 1907, to wit, $129.50, became due and payable January 6, 1908; that upon the completion of the work agreed to be done by the said Dorsey and the delivery of the materials agreed by him to be furnished, including said brick, to wit, on December 31, 1907,

the defendant, The Heine Safety Boiler Company, paid to the said Dorsey, to wit, the sum of $983.25, being the full amount due him less the sum of $167.55, which amount is still retained by the said
13 The Heine Safety Boiler Company; that there is no further or other sum due him than said sum of $167.55; that at the time of making said payment, to wit, on December 31, 1907, neither the said The Empire State Surety Company, nor the United States, nor this defendant, had notice or knowledge, or any reason to believe that the said Dorsey had not paid in full for the brick alleged to have been furnished by the use plaintiff as in its declaration alleged; although on said date and at the time of making said payment to said Dorsey, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20, the value of brick furnished on October 11, 1907, was, at the time of said payment, 51 days overdue, and the sum of $97.10, the value of brick furnished on November 19, 1907, was 12 days overdue; that the first notice received by said Heine Safety Boiler Company, contractor as aforesaid, from the use plaintiff, or from any source, of the fact that it furnished brick to said Dorsey for use under its contract with the United States and for which it had not been paid, was received by said Heine Safety Boiler Company from the use plaintiff on, to wit, February 25, 1908, long after the amounts alleged to be payable by said Dorsey were overdue and unpaid, and long after said Heine Safety Boiler Company had, in good faith and without notice of the claim of the use plaintiff, made the payment to the said Dorsey as aforesaid; and this defendant further says that between the date of its said payment to said Dorsey, to wit, December 31, 1907, and the date of the first notice from the use plaintiff of the
14 non-payment by Dorsey of the value of the brick furnished, to wit, on February 25, 1908, the said Dorsey became insolvent, and thereafter, to wit, on March 4, 1908, a petition in involuntary bankruptcy was filed against him upon which he was thereafter adjudged a bankrupt, and he is now unable to respond to any claim this defendant may have against him because of the payment by this defendant of the amount claimed by the use plaintiff; that the credit given by the use plaintiff to said Dorsey for said brick was unusual, and the delay in collecting the amount claimed to be due was unreasonable, and the delay of the use plaintiff in giving notice of its claim to this defendant was also unreasonable, and because thereof, and the insolvency of said Dorsey as aforesaid, the rights and remedies of this defendant that would otherwise have existed, have been lost, and its interests prejudiced, wherefore it denies the right of the plaintiff to recover any greater sum than $167.55, the amount due said Dorsey by this defendant, and remaining unpaid.

Third. That the brick mentioned in the plaintiff's declaration were sold and delivered by the use plaintiff upon three different dates, to wit, brick of the value of $631.20, on October 11, 1907; $97.10 on November 19, 1907; and $129.50, on December 7, 1907; that by the terms of the sale and by the agreement between the use plaintiff and the said H. L. Dorsey, the value of the brick delivered

on October 11, 1907, to wit, the sum $631.20, became due and payable, to wit, on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10 became due and payable December 19, 1907, and the value of the brick delivered on
15 December 7, 1907, to wit, $129.50, became due and payable January 6, 1908; that upon the completion of the work agreed to be done by the said Dorsey and the delivery of the materials agreed by him to be furnished, including said brick, to wit, on December 31, 1907, this defendant, paid to the said Dorsey, to wit. the sum of $983.25, being the full amount due him less the sum of $167.55, which amount is still retained by this defendant; that there is no further or other sum due him than the said sum of $167.55; that at the time of making said payment, to wit, on December 31, 1907, neither the said The Empire State Surety Company, nor the United States, nor this defendant, had notice or knowledge or any reason to believe that the said Dorsey had not paid in full for the brick alleged to have been furnished by the use plaintiff as in its declaration alleged; although on said date and at the time of making said payment to said Dorsey, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20, the value of brick furnished on October 11, 1907, was, at the time of said payment, 51 days overdue, and the sum of $97.10, the value of brick furnished on November 19, 1907, was 12 days overdue; that the first notice received by this defendant, as aforesaid, from the use plaintiff, or from any source, of the fact that it furnished brick to said Dorsey for use under its contract with the United States and for which it had not been paid, was received by this defendant from the use plaintiff on, to wit, February 25, 1908, long after the amounts alleged to be payable by said Dorsey were overdue and unpaid, and long after this defendant had, in good faith and without no-
16 tice of the claim of the use plaintiff, made the payment to the said Dorsey as aforesaid; and this defendant further says that on the date of said payment to the said Dorsey, on to wit, December 31, 1907, the said Dorsey was insolvent, of which fact the said Empire State Surety Company, the United States and this defendant, were, at said time, ignorant; that thereafter, to wit, in the month of March, 1908, the said Dorsey was adjudicated a bankrupt and is now unable to respond to any claim or demand that may be made against him; and this defendant further says that the credit given by the use plaintiff to the said Dorsey, for said brick was unusual and the delay in collecting the amount claimed to be due from said Dorsey was unreasonable, and the delay of said use plaintiff in giving notice of its claim to this defendant was also unreasonable and because thereof, and because of the insolvency of the said Dorsey at the time of said payment and the failure of the use plaintiff to give this defendant notice prior to said payment of the indebtedness claimed to be due it, by said Dorsey, the rights and remedies of this defendant, that would otherwise have existed, have been lost and its interest prejudiced, wherefore it denies the right of the use plaintiff to recover any greater sum, than the sum of $167.55, the amount due said Dorsey from this defendant and remaining unpaid.

BRANDENBURG & BRANDENBURG,
Attorneys for Defendants The Heine Safety Boiler Co.

17 STATE OF NEW YORK,
County of New York, ss:

E. D. Meier having first been duly sworn, upon oath deposes and says that he is President of the Heine Safety Boiler Company, one of the defendants in the above entitled suit, in which the United States to the use of the American Enameled Brick and Tile Company is named as plaintiff; that as such officer and agent of the defendant he has personal knowledge of the matter set forth in the plaintiff's declaration and the affidavit thereto annexed, and the grounds of said defendant's defense thereto; and upon such knowledge he denies the right of the plaintiff to recover the amount claimed in said declaration or any greater or further sum than $167.55; affiant further says that the grounds of said defendant's defense are as these; that this defendant fully performed its agreement with the United States of America and made full payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the contract in the plaintiff's declaration mentioned, except, nevertheless, the sum of $167.55, due by it to the said Dorsey as hereinafter set forth. Affiant further says that the brick mentioned in plaintiff's declaration was sold and delivered to the use plaintiff on three different days, brick of the value of $631.20 on October 11, 1907; $97.10 on November 19, 1907; and $129.50 on December 7, 1907; that by the terms of the sale, and by the agreement between the use plaintiff and the said Dorsey to whom the brick was furnished, the value of the brick deliv-

18 ered on October 11, 1907, to wit, $631.20 became due and payable on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10 became due and payable on December 19, 1907, and the value of the brick delivered on December 7, 1907, to wit, $129.50 became due and payable on January 6, 1908; that upon the completion of the work agreed to be done by said Dorsey and the delivery of the materials he agreed to furnish including said brick, to wit, on December 31, 1907, the said contractor, this defendant, paid to him the sum of $983.25 an amount in excess of the sum claimed by plaintiff; that on said date there was a balance due said Dorsey amounting to $167.55 which amount this defendant still retains; that there is no other or further sum due said Dorsey by this defendant; that on the date of making said payment neither the Empire State Surety Company, nor the United States nor this defendant, had notice or knowledge or any reason to believe that the said Dorsey had not been paid in full for the brick alleged to have been furnished by the use plaintiff to him as in its declaration alleged, although at said time, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20 was 51 days overdue, and the sum of $97.10 was 12 days overdue; that the first notice received by this defendant of the fact that the use plaintiff had furnished brick to said Dorsey for which it had not been paid, was received from the use plaintiff on February 25, 1908, long after the amounts payable by said Dorsey to the use plaintiff became due

and long after this defendant had, in good faith, and without
19 notice of the claim of the use plaintiff made the payment to the said Dorsey of the sum of $983.25. Affiant further says that to his information and belief on the date said last mentioned sum was paid by this defendant to said Dorsey, said Dorsey was insolvent, of which fact the said Empire State Surety Company, the United States and this defendant were all ignorant at said time; that thereafter and sometime in the month of March 1908 the said Dorsey was adjudicated a bankrupt; that since the date of said payment to him in December 1907 and the present time said Dorsey has had no means whereby any sum whatever could be recovered from him; the first notice received of the non-payment by said Dorsey of the amount due the use plaintiff, was received from the use plaintiff, after said payments, while said Dorsey was insolvent and a few days prior to the filing of the petition in bankruptcy against him; that had said use plaintiff given this defendant or the United States, or said defendant notice of the fact that it was furnishing brick to said Dorsey and the terms of credit thereof or that he had defaulted in payment thereof, when such payments became due and payable, said sum of $983.25 would not have been paid to said Dorsey by this defendant; that under the circumstances the said defendant alleges and claims that the credit given by the use plaintiff to said Dorsey for said brick was unusual, and the delay in collecting the amount claimed to be due was unreasonable and the delay of the use plaintiff in giving notice of said claim to this defendant was also unreasonable and because thereof, and the insolvency of said Dorsey, the rights and remedies of this
20 defendant, that would otherwise have existed have been lost and its interest prejudiced, and said defendant therefore denies the right of the use plaintiff to recover any sum greater than $167.55, the amount due said Dorsey from this defendant.

E. D. MEIER.

Subscribed and sworn to before me this 26th day of October A. D., 1909.

[SEAL.]

CHAS. A. GARDNER,
Notary Public, Kings County.

Certificate filed in New York County.

Pleas of the Empire State Surety Company.

Filed October 27, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51704.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation, Plaintiff.

vs.

HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Defendants.

For pleas to the plaintiff's declaration, the defendant, The Empire State Surety Company, says:

First. That the Heine Safety Boiler Company, the con-
21 tractor in the plaintiff's declaration mentioned, did make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the contract therein mentioned, and did otherwise and in all other respects fully perform the conditions of its bond, upon which this defendant was surety, described in said declaration.

Second. That the brick mentioned in the plaintiff's declaration were sold and delivered by the use plaintiff upon three different dates, to wit, brick of the value of $631.20, on October 11, 1907; $97.10 on November 19, 1907; and $129.50, on December 7, 1907; that by the terms of the sale and by the agreement between the use plaintiff and the said H. L. Dorsey, the value of the brick delivered on October 11, 1907, to wit, the sum of $631.20, became due and payable, to wit, on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10 became due and payable December 19, 1907, and the value of the brick delivered on December 7, 1907, to wit, $129.50, became due and payable January 6, 1908; that upon the completion of the work agreed to be done by the said Dorsey and the delivery of the materials agreed by him to be furnished, including said brick, to wit, on December 31, 1907, the said contractor, The Heine Safety Boiler Company, paid to the said Dorsey, to wit, the sum of $983.25, being the full amount due him less the sum of $167.55, which amount is still retained by the said The Heine Safety Boiler Company; that there is no further or other sum due him than said sum of $167.55; that at the time of making said payment, to wit, on December 31, 1907, neither the said The Heine Safety Boiler Company, nor the United
22 States, nor this defendant, had notice or knowledge, or any reason to believe that the said Dorsey had not paid in full for the brick alleged to have been furnished by the use plaintiff as in its declaration alleged; although on said date and at the time of making said payment to said Dorsey, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20, the value of brick furnished on October 11, 1907, was,

at the time of said payment, 51 days overdue, and the sum of $97.10, the value of brick furnished on November 19, 1907, was 12 days overdue; that the first notice received by said Heine Safety Boiler Company, contractor as aforesaid, from the use plaintiff, or from any source, of the fact that it furnished brick to said Dorsey for use under its contract with the United States and for which it had not been paid, was received by said Heine Safety Boiler Company from the use plaintiff on, to wit, February 25, 1908, long after the amounts alleged to be payable by said Dorsey were overdue and unpaid, and long after said Heine Safety Boiler Company had, in good faith and without notice of the claim of the use plaintiff, made the payment to the said Dorsey as aforesaid; and this defendant further says that between the date of its said payment to said Dorsey, to wit, December 31, 1907, and the date of the first notice from the use plaintiff of the non-payment by Dorsey of the value of the brick furnished, to wit, on February 25, 1908, the said Dorsey became insolvent, and thereafter, to wit, on March 4, 1908, a petition in involuntary bankruptcy was filed against him upon which he was thereafter adjudged a bankrupt, and he is now unable to respond
23 to any claim of the said contractor, the Heine Safety Boiler Company or this defendant may have against him because of the payment by said Heine Safety Boiler Company, or this defendant of the amount claimed by the use plaintiff; that the credit given by the use plaintiff to said Dorsey for said brick was unusual, and the delay in collecting the amount claimed to be due was unreasonable, and the delay of the use plaintiff in giving notice of its claim to the Heine Safety Boiler Company was also unreasonable, and because thereof, and the insolvency of said Dorsey as aforesaid, the rights and remedies of this defendant that would otherwise have existed, have been lost, and its interests prejudiced, wherefore it denies the right of the plaintiff to recover any greater sum than $167.55, the amount due said Dorsey by said Heine Safety Boiler Company, and remaining unpaid.

Third. That the brick mentioned in the plaintiff's declaration were sold and delivered by the use plaintiff upon three different dates, to wit, brick of the value of $631.20, on October 11, 1907; $97.10 on November 19, 1907; and $129.50, on December 7, 1907; that by the terms of the sale and by the agreement between the use plaintiff and the said H. L. Dorsey, the value of the brick delivered on October 11, 1907, to wit, the sum of $631.20, became due and payable, to wit, on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10 became due and payable December 19, 1907, and the value of the brick delivered on December, 7, 1907, to wit, $129.50, became due and payable January 6, 1908; that upon the completion of the work agreed to be done by
24 the said Dorsey and the delivery of the materials agreed by him to be furnished, including said brick, to wit, on December 31, 1907, the said contractor, The Heine Safety Boiler Company, paid to the said Dorsey, to wit, the sum of $983.25, being the full amount due him less the sum of $167.55, which amount is still retained by the said The Heine Safety Boiler Company; that there

is no further or other sum due him than said sum of $167.55; that at the time of making said payment, to wit, on December 31, 1907, neither the said The Heine Safety Boiler Company, nor the United States, nor this defendant, had notice or knowledge or any reason to believe that the said Dorsey had not paid in full for the brick alleged to have been furnished by the use plaintiff as in its declaration alleged; although on said date and at the time of making said payment to said Dorsey, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20, the value of brick furnished on October 11, 1907, was, at the time of said payment, 51 days overdue, and the sum of $97.10, the value of brick furnished on November 19, 1907, was 12 days overdue; that the first notice received by said Heine Safety Boiler Company, contractor as aforesaid, from the use plaintiff, or from any source, of the fact that it furnished brick to said Dorsey for use under its contract with the United States and for which it had not been paid, was received by said Heine Safety Boiler Company, from the use plaintiff on, to wit, February 25, 1908, long after the amounts alleged to be payable by said Dorsey were overdue and unpaid, and long after said Heine Safety Boiler Company had, in good faith and without notice of the claim of the use plaintiff,
25 made the payment to the said Dorsey as aforesaid; and this defendant further says that on the date of said payment by the said Heine Safety Boiler Company to the said Dorsey, on to wit, December 31, 1907, the said Dorsey was insolvent, of which fact the said Heine Safety Boiler Company, the United States and this defendant, were, at said time, ignorant; that thereafter, to wit, in the month of March 1908 the said Dorsey was adjudicated a bankrupt and is now unable to respond to any claim or demand that may be made against him; and this defendant further says, that the credit given by the use plaintiff to the said Dorsey, for said brick was unusual and the delay in collecting the amount claimed to be due from said Dorsey was unreasonable, and the delay of said use plaintiff in giving notice of its claim to said Heine Safety Boiler Company was also unreasonable and because thereof, and because of the insolvency of the said Dorsey at the time of said payment and the failure of the use plaintiff to give said Heine Safety Boiler Company notice prior to said payment of the indebtedness claimed to be due it, by said Dorsey, the rights and remedies of this defendant, that would otherwise have existed, have been lost and its interest prejudiced, wherefore it denies the right of the use plaintiff to recover any greater sum, than the sum of $167.55, the amount due said Dorsey from the said Heine Safety Boiler Company and remaining unpaid.

BRANDENBURG & BRANDENBURG,
Attorneys for Defendants, The Empire State Surety Company.

26 STATE OF NEW YORK,
County of New York, ss:

Walter J. Moore having first been duly sworn, upon oath deposes and says that he is Vice President of the Empire State Surety Com-

pany, one of the defendants in the above entitled suit, in which the United States to the use of the American Enameled Brick and Tile Company is named as plaintiff; that as such officer and agent of the defendant he has personal knowledge of the matter set forth in the plaintiff's declaration and the affidavit thereto annexed, and the grounds of said defendant's defense thereto; and upon such knowledge he denies the right of plaintiff to recover the amount claimed in the said declaration or any greater or further sum than $167.55; affiant further says that the grounds of said defendant's defense are as these; that the Heine Safety Boiler Company, contractor, fully performed its agreement with the United States of America and made full payment to all persons supplying it labor or materials in the prosecuting of the work contemplated by the contract in the plaintiff's declaration mentioned, except, nevertheless, the sum of $167.55 due by the said Heine Safety Boiler Company to the said Dorsey as hereinafter set forth. Affiant further says that the brick mentioned in plaintiff's declaration was sold and delivered to the use plaintiff on three different days, brick of the value of $631.20 on October 11, 1907; $97.10 on November 19, 1907; and $129.50 on December 7, 1907; that by the terms of the sale, and by the agreement between the use plaintiff and the said Dorsey to whom the brick was
27 furnished, the value of the brick delivered on October 11, 1907, to wit, $631.20 became due and payable on November 10, 1907, and the value of the brick delivered on November 19, 1907, to wit, $97.10, became due and payable on December 19, 1907, and the value of the brick delivered on December 7, 1907, to wit, $129.50 became due and payable on January 6, 1908; that upon the completion of the work agreed to be done by said Dorsey and the delivery of the materials he agreed to furnish including said brick, to wit, on December 31, 1907, the said contractor, the said Heine Safety Boiler Company paid to him the sum of $983.25 an amount in excess of the sum claimed by plaintiff; that on said date there was a balance due said Dorsey amounting to $167.55 which amount said Heine Safety Boiler Company still retains; that there is no other or further sum due said Dorsey by said Heine Safety Boiler Company; that on the date of making said payment neither the said Heine Safety Boiler Company, nor the United States nor this defendant, had notice or knowledge or any reason to believe that the said Dorsey had not been paid in full for the brick alleged to have been furnished by the use plaintiff to him as in its declaration alleged, although at said time, all the brick for which the use plaintiff claims compensation had been furnished and the sum of $631.20 was 51 days overdue, and the sum of $97.10 was 12 days overdue; that the first notice received by said Heine Safety Boiler Company of the fact that the use plaintiff had furnished brick to said Dorsey for which it had not been paid, was received by said Heine Safety Boiler Company from the use
28 plaintiff on February 25, 1908, long after the amounts payable by said Dorsey to the use plaintiff became due and long after the said Heine Safety Boiler Company had, in good faith, and without notice of the claim of the use plaintiff made the payment to the said Dorsey of the sum of $983.25. Affiant further says that to

his information and belief on the date said last mentioned sum was paid by said Heine Safety Boiler Company to said Dorsey, said Dorsey was insolvent, of which fact the said Heine Safety Boiler Company, the United States and said defendant were all ignorant at said time; that thereafter and sometime in the month of March 1908 the said Dorsey was adjudicated a bankrupt; that since the date of said payment to him in December 1907 and the present time said Dorsey has had no means whereby any sum whatever could be recovered from him; the first notice received of the non-payment by said Dorsey of the amount due the use plaintiff, was received from the use plaintiff, after said payments, while said Dorsey was insolvent and a few days prior to the filing of the petition in bankruptcy against him; that had said use plaintiff given the said Heine Safety Boiler Company or the United States, or said defendant, the Surety, notice of the fact that it was furnishing brick to said Dorsey and the terms of credit thereof or that he had defaulted in payment thereof, when such payments became due and payable, said sum of $983.25 would not have been paid to said Dorsey by said Heine Safety Boiler Company: that under the circumstances the said defendant alleges and claims that the credit given by the use plaintiff to said Dorsey
29 for said brick was unusual, and the delay in collecting the amount claimed to be due was unreasonable and the delay of the use plaintiff in giving notice of said claim to the Heine Safety Boiler Company was also unreasonable and because thereof, and the insolvency of said Dorsey, the rights and remedies of this defendant, that would otherwise have existed have been lost and its interests prejudiced, and said defendant therefore denies the right of the use plaintiff to recover any sum greater than $167.55, the amount due said Dorsey from the Heine Safety Boiler Company.

WALTER J. MOORE.

Subscribed and sworn to before me this 26th day of October, A. D. 1909.

CHAS. A. GARDNER,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

Motion for Judgment.

Filed November 2, 1909.

In the Supreme Court of the District of Columbia.

No. 51704. Law Docket.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE CO., a Corporation, Plaintiff,
vs.
HEINE SAFETY BOILER COMPANY et al., Defendants.

30 Now comes the Plaintiff, by Ralston, Siddons and Richardson, its attorneys, and moves the Court for judgment against

both of the defendants, Heine Safety Boiler Company and The Empire State Surety Company, under the seventy-third rule of said Court, notwithstanding their respective pleas.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

NOVEMBER 2, 1909.

To Messrs. Brandenburg & Brandenburg, Attorneys for Defendants, Heine Safety Boiler Company and The Empire State Surety Company:

Take notice that the aforegoing will be for hearing on the 5th day of November, A. D. 1909.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

Supreme Court of the District of Columbia.

WEDNESDAY, *November* 17, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 51704.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation, Pltf.,
vs.
HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Def'ts.

31 It appearing to the Court that the defendants have failed to file amended affidavits of defense herein, within the time allowed by order of November 5, 1909, and now in open Court say that they will stand upon the original pleas and affidavits filed herein, it is ordered that the motion for judgment filed by the plaintiff herein be, and the same is hereby granted.

Therefore it is considered that the plaintiff recover against said defendants Eight hundred and fifty-seven and 80/100 dollars ($857.80) with interest on Six hundred and thirty-one and 20/100 dollars ($631.20) thereof from the 11th day of November, 1907, until paid; on Ninety-seven and 10/100 dollars ($97.10) thereof from the 19th day of December, 1907, until paid; and on One hundred and twenty-nine and 50/100 dollars ($129.50) thereof from the 7th day of January, 1908, until paid, being the money payable by said defendants to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

Thereupon the defendants by their Attorneys in open Court note an appeal to the Court of Appeals of the District of Columbia, and

upon motion, the penalty of the bond on said appeal, to act as a Supersedeas, is hereby fixed in the sum of Eighteen hundred dollars ($1800.).

32 *Memorandum.*

November 30, 1909.—Supersedeas bond approved and filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed November 30, 1909.

In the Supreme Court of the District of Columbia the 30th Day of November, 1909.

At Law. No. 51704.

THE UNITED STATES to the Use of AMERICAN ENAMELED BRICK & TILE CO.
vs.
HEINE SAFETY BOILER CO. et al.

The Clerk of said Court will please prepare record on appeal.
Declaration.
Pleas of defendants 1 & 2.
Motion for judgment.
Judgment.
Memo. of bond &c.
This order.

BRANDENBURG & BRANDENBURG,
Attorneys for Defendants.

33 *Memorandum.*

January 14th, 1910.—Time in which to file transcript of record extended to February 20th, 1910.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51704 at Law, wherein The United States of America to the use of the American Enameled Brick and Tile Company, a corporation is Plaintiff and Heine Safety Boiler Company, a corporation, and The Empire State Surety Com-

pany, a corporation are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 15th day of January, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2108. Heine Safety Boiler Co. et al., appellants, vs. The United States of America to the use of the American Enameled Brick & Tile Co. Court of Appeals, District of Columbia. Filed Jan. 19, 1910. Henry W. Hodges, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2108.

HEINE SAFETY BOILER COMPANY, A CORPORATION, AND THE EMPIRE STATE SURETY COMPANY, A CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF THE AMERICAN ENAMELED BRICK AND TILE COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 19, 1910.

Contract between the United States of America and the Heine Safety Boiler Company.

Whereas, By advertisement, duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

Whereas, The proposal of the Heine Safety Boiler Company furnished in response thereto, was duly accepted, as hereinafter stated, on condition that it execute a contract in accordance with the terms of said bid.

Now, therefore, this agreement, made and entered into by and between J. B. Reynolds, Acting Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and the Heine Safety Boiler Company, a corporation organized under the laws of

the State of Missouri and having executive offices in Philadelphia, Pa., of the second part,

Witnesseth: That the party of the second part for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the two new high-pressure steam boilers, etc., in boiler room in south court of the Treasury at Washington, D. C., in strict and full accordance with the requirements of drawings numbered RH180, and such other detail drawings as may be furnished to the party of the second part by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated April 27, 1907; the specification for the work; the proposal dated May 16, 1907, addressed to the said Supervising Architect by the said party of the second part; and letter dated June 19, 1907, addressed to the said party of the second part by Beekman Winthrop, Assistant Secretary of the Treasury, accepting said proposal; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the Office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and at such times and seasons, and with such force as shall from time to time be directed or prescribed by the Supervising Architect or his representative, and that the same shall be completed in all its parts [within]* by October 16, 1907; [from the date of the approval of said bond hereto attached;]* that all materials used shall be of the very best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner, and that both the materials used and the work performed shall be in every respect to the entire and complete satisfaction of the Supervising Architect.

And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also, for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification.

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of ten dollars, for each and every day the said party of the second part shall be in default,

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[*Words enclosed in brackets erased in copy.]

which said sum of ten dollars per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined, and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the United States, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article, or appliance, included in the materials hereby agreed to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically provided; that all materials and work furnished shall be subject to the approval of the said Supervising Architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates; which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties; and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed.

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part; and that no addition to,

omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and, in the absence of an express agreement or provision to the contrary, no addition to, or omission from, or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract; and the decision of said Supervising Architect as to quality and quantity shall be final. And it is further covenanted and agreed by and between the parties hereto that said party of the second part will without expense to the United States, within a reasonable time to be specified by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that, in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

It is further covenanted and agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work herein provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for; or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' due notice thereof in writing. served personally upon or left at the shop, office, or usual place of abode, or with the agent of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the

said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the Supervising Architect, it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the said party of the second part shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.

And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said party of the second part, or to the heirs, executors, administrators, or successors, of the said party of the second part, in lawful money of the United States, in consideration of the herein-recited covenants and agreements made by the party of the second part, the sum of nine thousand eight hundred (9,800.) dollars.

And the party of the first part covenants and agrees that payments will be made in the following manner, viz: ninety per cent of the value of the work executed and actually in place, to the satisfaction of the party of the first part, will be paid from time to time as the work progresses (the said value to be ascertained by the party of the first part), and ten per cent thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract; provided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached —on account of which payment is claimed—shall be found to be satisfactorily supplied and executed in every particular and any and

all defects therein remdied to the entire satisfaction of the said party of the first part.

It is an express condition of this contract that no Member of or Delegate to, Congress, or other person whose name is not at this time disclosed, shall be admitted to any share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

In witness whereof, The parties hereto have hereunto subscribed their names this 20th day of June, A. D. 1907.

All erasures, alterations, and interlineations to be noted here before execution.

The erasures in lines 22 and 24, page 2, and the interlineation in line 11, page 5, were made before the execution hereof.

J. B. REYNOLDS,
Acting Secretary of the Treasury.

JAW KEMPER, R.

We hereby certify that this contract and bond have been correctly prepared and compared:

W. F. FIELD,
Acting Chief of the Law and Records Division.

J. A. SUTHERLAND,
Chief of Inspection Division.

HEINE SAFETY BOILER COMPANY. [SEAL.]
[Place Corporate Seal here.]
Contractor.

By E. D. MEIER, *President.*

Attest:
GEO. I. BOUTON, *Ass't Secretary.*

Witnesses to the signature of the Contractor:
Two witnesses.
J. L. DALY.
H. A. BRANGS.

NOTE.—Read rules carefully before executing.

Bond.

Know all men by these presents, That we, the Heine Safety Boiler Company, a corporation organized under the laws of the State of Missouri and having executive offices in the City of Philadelphia, County of —— and State of Pa., principal, and The Empire State Surety Co., a corporation of the State of New York, having branch offices at 417-18 North American Building in the City of Philadelphia, County of Philadelphia, and State of Pennsylvania, and ——, of the City of ——, County of ——, and State of ——, surety,

are held and firmly bound unto the United States of America in the sum of five thousand dollars ($5,000), lawful money of the United States, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this Twenty-fifth day of June, A. D. 1907.

The condition of the above obligation is such, That whereas the said Heine Safety Boiler Company has entered into a certain contract, hereto attached, with J. B. Reynolds, Acting Secretary of the Treasury, acting for and in behalf of the United States, bearing date the 20th day of June, A. D. 1907: *Now,* if the said Heine Safety Boiler Company shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by it to be performed, and shall well and truly comply with and fulfill the conditions of, and perform all of the work and furnish all the labor and materials required by, any and all changes in, or additions to, or omissions from, said contract which may hereafter be made, and shall perform all the undertakings stipulated by it to be performed in any and all such changes in, or additions thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue.

In testimony whereof, The said Heine Safety Boiler Company, principal, and —— —— and The Empire State Surety Co., surety, have hereunto subscribed their hands and affixed their seals the day first above written.

(Seals of wax or wafer.)

HEINE SAFETY BOILER COMPANY, [SEAL.]
By E. D. MEIER, *President.*
GEO. I. BOUTON, *Ass't Sec'y.*

Signed, sealed, and delivered in presence of—

Two witnesses to each signature.

J. L. DALY.
H. A. BRANGS.

THE EMPIRE STATE SURETY CO. [SEAL.]
GEO. D. WEAVER, *Res. Vice Pres.*
M. V. EAGAN, *Acting Res. Ass't Sec'y.*

As to surety:

ALBERT M. FREE.
HERMAN F. SCHWEFLER.

NOTE.—Read rules carefully before executing.

Form of Justification by Corporate Sureties.

(This form is to be used in connection with the execution of all bonds when the surety thereon is a guarantee or surety company.)

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Personally appeared before me, Geo. D. Weaver, on this 25th day of June, one thousand nine hundred and seven, known to me to be the Resident Vice President of the The Empire State Surety Co., the corporation described in and which executed the annexed bond of The Heine Safety Boiler Co., as surety thereon, and who, being by me duly sworn, deposes and says that he resides at Philadelphia, in the State of Pennsylvania; that he is the Resident Vice President of the said The Empire State Surety Co. *Company,* and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The Heine Safety Boiler Company is the corporate seal of the said The Empire State Surety Co. *Company,* and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as Resident Vice President of said company; and that he is acquainted with M. V. Eagan, and knows him to be the Acting Resident Assistant Secretary of said company; and that the signature of said M. V. Eagan subscribed to said bond is in the genuine handwriting of said M. V. Eagan, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of ten thousand dollars ($10,000.00).

Deponent further says that *Geo. D. Weaver, the deponent, residing at Philadelphia, in the State of Pennsylvania, has been duly appointed as the agent of said company to accept service of process against said company in the Eastern judicial district of Pennsylvania, and is authorized to enter an appearance in behalf of said company in any action, suit, or proceeding brought against it in said judicial district.

GEO. D. WEAVER.

Sworn to, acknowledged before me, and subscribed in my presence this 25th day of June, 1907.

HERMAN F. SCHWEFLER, [SEAL.]
Notary Public.

My commission expires January 16, 1909.

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*NOTE.—Here must be inserted the name of the agent for the district in which the building or work is situated.

In the Court of Appeals of the District of Columbia.

No. 2108.

HEINE SAFETY BOILER COMPANY, a Corporation, and THE EMPIRE STATE SURETY COMPANY, a Corporation, Appellants,

vs.

THE UNITED STATES OF AMERICA to the Use of THE AMERICAN ENAMELED BRICK AND TILE COMPANY, a Corporation.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the contract and bond of which profert is made is the declaration, and is hereto annexed, may be considered and treated as a part of the record on this appeal and to that end the same may be ordered to be printed by the Clerk.

BRANDENBURG & BRANDENBURG,
Attorneys for Appellant.

RALSTON, SIDDONS AND RICHARDSON,
Attorneys for Appellee.

(Endorsed:) No. 2108. Heine Safety Boiler Co., &c., et al., Appellants, vs. The U. S. of A. to the use of the American Enameled Brick and Tile Co. Addition to Record per Stipulation of Counsel. Court of Appeals, District of Columbia. Filed Mar. 19, 1910. Henry W. Hodges, Clerk.

Henry W. Hodges,
to Leave.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2108.

HEINE SAFETY BOILER CO. ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF THE AMERICAN ENAMELED BRICK AND TILE CO., APPELLEE.

BRIEF FOR APPELLEE.

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2108.

HEINE SAFETY BOILER CO. ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF THE AMERICAN ENAMELED BRICK AND TILE CO., APPELLEE.

BRIEF FOR APPELLEE.

Statement of Case.

This action was instituted by the appellee by filing its declaration at law in the court below against the two appellants as principal and surety, respectively, upon a bond made and executed and delivered by them to the United States of America, on, to wit, the 25th day of June, A. D. 1907, which bond they gave to secure the faithful observance and performance of the covenants and conditions of a contract entered into by the appellant Boiler Company with the United States of America, whereby the said Boiler Company was to furnish all of the labor and materials and

do and perform all the work required for two new high-pressure steam boilers in the boiler-room in the south court of the Treasury Building, at Washington, D. C., and also to *promptly make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by the aforesaid contract.* And the bond was so conditioned. (Pages 6 and 7, Addition to Record.)

The basis of the action brought by the appellee was the furnishing by it to one H. L. Dorsey, whom the appellant Boiler Company had either contracted with or employed to supply certain of the labor and materials requisite and necessary in order that said Boiler Company might carry out its said contract with the United States; that the material supplied by the appellee was brick, which admittedly went into the work required to be done by the contract between the Boiler Company and the United States. The appellee supplied the brick required under its contract with Dorsey, and the agreed price for said brick amounted to eight hundred fifty-seven and 80/100 (857.80) dollars. It never received any part of the agreed purchase price for said brick, or for the cost of packing a portion of it for shipment, and therefore brought this suit upon the aforesaid bond, which is one required to be given by the act of Congress approved August 18, 1894, 28 Stats. at Large, No. 278, as amended by the act of February 24, 1905, 33 Stats. at Large, 811. The pleas of the appellants to the appellee's declaration do not deny the delivery of the brick, or that it was actually used in the construction of the work covered by the bond and contract of the appellant Boiler Company, but the defense set up, and which the court below rejected as not well founded in law, was, first, that when the credit period of thirty days upon each of the shipments of brick supplied by the appellee to the said Dorsey, had expired, and Dorsey had failed to pay the appellee for the brick so shipped, it was the duty of the appellee to notify the Boiler Company of the fact, and that the appellee's

failure to do so operated as a release of the appellant surety company, and that the appellant Boiler Company was also discharged, because, not having received notice in time from the appellee that Dorsey had not paid it the purchase price for said brick, it, the appellant Boiler Company, had paid to Dorsey a large part of the compensation or contract price agreed upon between it and him for the part that he took in carrying out the contract of the Boiler Company with the United States Government, and that they did not receive any notice of the appellee's claim until just before bankruptcy proceedings were taken against Dorsey. In this connection it will be observed from the appellant's case that the payment that the Boiler Company made to Dorsey was made on December 31, 1907, and that this payment amounted to the sum of nine hundred eighty-three and 25/100 (983.25) dollars, which, it states, paid his claim against it in full, excepting the sum of one hundred sixty-seven and 55/100 (167.55) dollars, which it withheld, and which was more than sufficient to pay the amount of the third shipment of material made by the appellee to said Dorsey; that the appellee did advise the appellant Boiler Company that it had a claim against Dorsey, and that this notice, it was said, was received by the Boiler Company on February 25, 1908, when payments for two of the shipments made by the appellee to Dorsey were past due. The bankruptcy proceedings against Dorsey were instituted on March 4, 1908, and in these proceedings he was adjudicated a bankrupt. That because of these conditions—that is to say, the overdue payments owing by Dorsey to the appellee and his insolvency—the appellants are released from the obligation of the bond referred to so far as the appellee is concerned.

Second. The appellants also contend apparently that the failure of the appellee to immediately institute proceedings to enforce payment by Dorsey of the sums due it by him, upon the expiration of the credit period, amounts to such

an extension of the time of payment as under a familiar rule releases the surety on the bond, such surety not having assented to such alleged extension.

ARGUMENT.

The contentions advanced by the appellants in this case seem to us to have been disposed of by the Supreme Court in the case of the United States Fidelity and Guaranty Company *vs.* The United States to the Use of, etc., 191 U. S., 416 *et seq.* In that case the bond sued upon was similar to the one involved in the present appeal, and contained the precise condition or covenant heretofore quoted, that the principal on the bond should "promptly make payment to all persons supplying him labor or material in the prosecution of the work contemplated by his said contract." The Surety Company, sued on that bond, denied its liability upon the ground that the subcontractor or material man, furnishing in that case, as in this, brick, had, without the knowledge or consent of the surety, granted to the principal an extension of the time of payment of the balance due on account of the purchase price of the brick furnished, and accepted from such principal promissory notes running for thirty and sixty days respectively, and the surety invoking the general rule that such extensions of time granted without the knowledge or consent of the surety, release it, insisted that the definite extension granted in that case released it from its obligation on the bond. The Supreme Court, speaking through Mr. Justice Brown (page 423), stated the question involved thus:

> "The question involved is whether the ordinary rule that exonerates the guarantor in case the time fixed for the performance of the contract by the principal be extended, applies to a bond of this kind, executed by a guarantee company not only for a faithful performance of the original contract, but for the pay-

> ment of the debts of the principal obligor to third parties. It is conceded that, by the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability."

Later, in speaking of the particular covenant of the bond, the court said (page 425):

> "In this covenant the surety guarantees nothing to the principal obligee,—the Government,—tho the latter permits an action upon the bond for the benefit of the subcontractors. The covenant is made solely for their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the amount, nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain."

The court concluded by rejecting the rule invoked by the surety in that case, saying:

> "It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should

be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

In the case at bar there was no extension of credit. The contract credit period of each shipment was thirty days. These credit periods expired and payment was not made by Dorsey. At the most the conduct of the appellee was a mere forbearance on its part from immediately bringing suit for each shipment when the original credit period had expired. Mere forbearance to sue, we do not understand, releases a surety or guarantor.

It is immaterial that the failure to sue upon demands may have resulted injuriously to the surety, so long as there was no variation in the original contract of suretyship, either as respects a new consideration or a definite extension of time, since it is a familiar principle of law that the mere omission or forbearance to sue the principal without the request of the surety will not discharge the surety.

Cross *vs.* Allen, 141 U. S., 528.

A surety upon a bond is not discharged by a mere delay to demand payment after it becomes due, unaccompanied by fraud or an express agreement with the principal to allow the delay.

Hunt *vs.* U. S., 1 Gall., 32, No. 6900, Fed. Cases.

While a binding agreement by a creditor with his principal debtor that he will extend time of payment or will forbear to collect debt releases surety. mere forbearance or delay on creditor's part does not release him.

Greenway *vs.* Orthwein Grain Co., 85 Fed. Rep., 536.

It is not pretended in this case that there was any agreement on the part of the appellee with Dorsey to give him further time in which to pay his indebtedness to it.

The appellants complain of the failure of the appellee

to notify them of Dorsey's default. We respectfully submit that there was no duty to do so resting upon the appellee, and there is a significant circumstance developed by the appellants, which shows that they undertook to make some inquiries as to Dorsey's obligations for the brick material that he was using, because the appellant Boiler Company did not pay Dorsey in full, but withheld the sum of one hundred sixty-seven and 55/100 (167.55) dollars, and it is to be remembered that at the time of making the payment to Dorsey all of the brick for the price of which this action was brought, had been furnished by the appellee to Dorsey. Why it retained this sum is not stated, although it admits that the appellee is entitled to recover the amount so retained. And in the brief of the appellants, pages 5 and 6, referring to the sum of one hundred sixty-seven and 55/100 (167.55) dollars retained, it is said that this "was more than sufficient to satisfy the third shipment to said Dorsey, and which had not matured at the time of such payment," from which it may fairly be inferred that the Boiler Company did have knowledge of the shipments and credits, and that it only paid Dorsey after the shipments had been made and the credit period had expired. Of course it would have been a simple matter for the Boiler Company to have inquired as to where Dorsey was obtaining his material and how he was paying for it, and it is submitted that the duty to do this rested upon the Boiler Company. It must be presumed to know of the contingent liabilities to which it and its surety under their bond were exposed, and it would have been an easy matter for both the principal and the surety to have protected themselves against such liabilities in dealing with subcontractors or employees occupying the position towards them that Dorsey did in this case.

The appellee is charged with unfair dealing towards the appellants, and in support of this serious charge, the appellants only point to the fact that the appellee did not

promptly notify the Boiler Company that Dorsey was not paying for the material purchased by him from the appellee. The answer to this charge is, first, that it was no part of the appellee's duty to notify the Boiler Company of Dorsey's default; second, the appellee had a right to rely upon the bond that the appellants had given. It was given for its protection and it was not for the appellants to rely on material men keeping them informed about the state of accounts with the subcontractors; it was rather the duty of the appellants to inquire and protect themselves as they might have done. In the language of the Supreme Court in the case of U. S. to the use of, etc., Hill *vs.* Am. Surety Co., 200 U. S., 197, 204:

> "It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnished work or labor to go into the structure."

The court in this case had before it precisely the same kind of a bond that we are considering in the one at bar.

We respectfully submit that the judgment of the court below was right and should be affirmed.

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Appellee.